

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Applications of)	
)	
ESTATE OF LINDA WARE, CYNTHIA	)	File No. BALH-20150318AAY
RAMAGE, EXECUTOR, Assignor	)	Facility ID No. 37725
)	
To Assign the License of Broadcast Station)	
KZPO(FM), Lindsay, California)	
)	
ESTATE OF H.L. CHARLES, ROBERT	)	File No. BAPH-20150320AAT
WILLING, EXECUTOR, Assignor	)	Facility ID No. 22030
)	
To Assign the Construction Permit of Broadcast)	
Station KZPE(FM), Ford City, California)	
)	
WILLIAM L. ZAWILA, Assignor	)	File No. BAPH-20150320AAP
	)	Facility ID No. 72672
)	
To Assign the Construction Permit of Broadcast)	
Station KNGS(FM), Coalinga, California)	
)	
AVENAL EDUCATIONAL SERVICES, INC.,	)	File No. BAPED-20150403ABF
Assignor	)	Facility ID No. 3365
)	
To Assign the Construction Permit of)	
Broadcast Station KAAX(FM), Avenal, California)	
)	
CENTRAL VALLEY EDUCATIONAL	)	File No. BAPED-20150403ABD
SERVICES, INC., Assignor	)	Facility ID No. 9993
)	
To Assign the Construction Permit of)	
Broadcast Station KYAF(FM), Firebaugh,)	
California)	
)	
BIG RADIO PRO, INC., Assignee)	

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 2016

Released: June 17, 2016

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this *Memorandum Opinion and Order* we deny the Application for Review to the Commission (AFR) filed April 7, 2016, by the Estate of Linda Ware, Cynthia Ramage, Executor (Ware Estate); the Estate of H.L. Charles, Robert Willing, Executor (Charles Estate); William L. Zawila (Zawila); Avenal Educational Services, Inc. (AES); and Central Valley Educational Services, Inc. (CVES) (collectively “Applicants”).

2. Applicants Charles Estate, Zawila, AES, and CVES are the permittees, and Ware Estate is the licensee, of five broadcast radio stations in California,¹ all of which were designated for revocation hearing by the Commission in order to resolve, *inter alia*, issues of lack of candor, misrepresentation, unauthorized transfer of control, and other violations of the Commission's rules.² In 2003, the hearing proceeding was stayed to allow the Applicants to pursue a minority distress sale of the Stations.³ Applications for approval to assign the Stations' authorizations to Lazer Broadcasting Corporation (Lazer) pursuant to that policy were filed on February 17, 2004.⁴ Three of the 2004 Applications were dismissed because the proposed assignors had failed to pay regulatory fees for KZPE(FM), KZPO(FM), and KNGS(FM),⁵ and the applications were thus subject to dismissal under Commission rules implementing the Debt Collection Improvement Act of 1996.⁶ Zawila, Charles Estate, and Ware Estate attempted to seek waiver of the outstanding regulatory fees,⁷ or to postpone payment until after the proposed assignments were consummated, but these requests were denied.⁸ Applicants did not appeal these denials or re-file applications for Commission approval to assign the authorizations to Lazer.

3. Instead, in March and April 2015, Applicants filed the new applications captioned above (Applications) to assign the Station authorizations to Big Radio Pro, Inc., claiming to do so under the minority distress sale policy. Counsel for AES and CVES filed a petition to deny the Applications, which was granted in part by the Media Bureau (Bureau).⁹ The Bureau held that the minority distress sale policy had been discontinued following the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*.¹⁰ It further held that application of the minority distress sale policy's replacement, a policy allowing distress sales to "eligible entities,"¹¹ had been suspended after the court of appeals vacated the eligible

¹ The stations are KZPO(FM), Lindsay, California (Ware Estate); KZPE(FM), Ford City, California (Charles Estate); KNGS(FM), Coalinga, California (Zawila); KAAX(FM), Avenal, California (AES); and KYAF(FM), Firebaugh, California (CVES) (collectively "Stations").

² *William L. Zawila, et al.*, Order to Show Cause, Notice of Opportunity for Hearing, and Hearing Designation Order, 18 FCC Rcd 14938 (2003) (*Zawila HDO*). The hearing proceeding, EB Docket No. 03-152, remains pending before Chief Administrative Law Judge Richard L. Sippel.

³ *William L. Zawila, et al.*, Order, FCC 03M-39, EB Docket No. 03-152 (ALJ Sept. 10, 2003).

⁴ File Nos. BAPH-20040217AEF (KNGS(FM)); BAPH-20040217AEI (KZPE(FM)); BALH-20040217AEJ (KZPO(FM)); BAPED-20040217AEH (KYAF(FM)); and BAPED-20040217AEG (KAAX(FM)) (the "2004 Applications").

⁵ KYAF(FM) and KAAX(FM) were permitted as noncommercial educational (NCE) stations, and thus did not owe regulatory fees. However, the proposed sales transaction was for all five Stations.

⁶ 47 CFR § 1.1910(b)(2). See also Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996); *Amendment of Parts 0 and 1 of the Commission's Rules—Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors*, Report and Order, 19 FCC Rcd 6540 (2004).

⁷ The 2004 Applications to assign the KZPO(FM) license and the KZPE(FM) permit were further defective, insofar as both were initially filed in the names of, respectively, Linda Ware and H.L. Charles as assignors, and both were deceased at the time of filing. The applications could not be reinstated until grant of applications assigning the authorizations to the executors of the applicants' estates. See File Nos. BALH-20040520AJH, BAPH-20040520AJI.

⁸ See generally *Estate of Linda Ware, Cynthia Ramage, Executor, et al.*, Memorandum Opinion and Order, 29 FCC Rcd 15061 (2014) (*Ware MO&O*).

⁹ *William L. Zawila, Esq. and Michael Couzens, Esq.*, Letter Decision, Ref. No. 1800B3-TSN (MB Sept. 17, 2015) (*Staff Decision*).

¹⁰ 515 U.S. 200 (1995) (*Adarand*).

¹¹ *Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Further Notice of Proposed Rule Making, 23 FCC Rcd 5922, 5939 para. 39 (2008) (*Diversity Order*). In the Applications, Big Radio (continued....)

entity definition, remanding to the Commission those provisions of the *Diversity Order* that relied on that definition.¹² Applicants petitioned for reconsideration, arguing as they had below that the minority distress sale policy was the “law of the case,” that the Commission had acknowledged this, and that therefore the Applications should be processed. The Bureau denied the petition for reconsideration by letter dated March 9, 2016.¹³ Applicants timely filed the AFR seeking Commission review of that letter.

II. DISCUSSION

4. In their AFR, Applicants argue that the Bureau erred by failing to recognize the applicability of the minority distress sale policy to them and the Applications; by failing to recognize the minority distress sale policy as the “law of the case” in the hearing proceeding; by refusing to process the Applications under the minority distress sale policy; and by acting beyond its delegated authority by making policy determinations more properly made by the full Commission.¹⁴ Applicants persist in their assertion that the minority distress sale policy, even if no longer generally in effect, still applies to them. We disagree, and deny the AFR for the reasons set forth in the *Staff Decision* and *Reconsideration Decision*.

5. The Bureau, in its decisions, accurately summarized the current status of the Commission’s distress sale policies. The minority distress sale policy, and the subsequent eligible entity distress sale policy, were exceptions to the general rule that a licensee or permittee may not assign its authorization when character issues are pending against the proposed assignor.¹⁵ In a distress sale, an authorization subject to a hearing on character issues could be assigned, for less than the facility’s appraised value, to a qualified entity in order to promote broadcast ownership diversity.¹⁶ After the Supreme Court in *Adarand* specifically overruled its previous decision upholding the minority distress sale policy’s constitutionality,¹⁷ the Commission replaced that race-based policy with the revenue-based eligible entity distress sale policy.¹⁸ The eligible entity standard was vacated in *Prometheus II*,¹⁹ however, and the Bureau accordingly suspended all rules and policies using that standard, including the distress sale policy.²⁰ In its actions below, the Bureau therefore correctly assessed that the distress sale policy is

(Continued from previous page) _____

Pro, Inc., the proposed assignee, claims to be both minority owned and an eligible entity. See, e.g., File No. BAPH-20150320AAT, Exhs. 7, 20.

¹² *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*). See *Staff Decision* at 3-4.

¹³ William L. Zawila, Esq. and Michael Couzens, Esq., Letter Decision, Ref. No. 1800B3-TSN (MB Mar. 9, 2016) (*Reconsideration Decision*).

¹⁴ AFR at 5.

¹⁵ See *Jefferson Radio Corp. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) (*Jefferson Radio*), holding that, “[i]t is the recognized policy of the Commission that assignment of broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited the authorization.”).

¹⁶ *Statement of Policy on Minority Ownership of Broadcasting Facilities*, Public Notice, 68 F.C.C.2d 979, 983, clarified, 44 R.R.2d 479 (1978) (minority distress sale policy); *Diversity Order*, 23 FCC Rcd at 5939 para. 39 (eligible entity distress sale policy).

¹⁷ *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 600-01 (1990) (overruled by *Adarand*, supra note 10, 515 U.S. at 225-27).

¹⁸ *Diversity Order*, 23 FCC Rcd at 5939 para. 39.

¹⁹ *Prometheus II*, 652 F.3d at 471-72.

²⁰ *Media Bureau Provides Notice of Suspension of Eligible Entity Rule Changes and Guidance on the Assignment of Broadcast Station Construction Permits to Eligible Entities*, Public Notice, 26 FCC Rcd 10370, 10370 (MB 2011).

currently suspended, thus precluding the filing and processing of applications such as Applicants' that rely on that policy.²¹

6. We likewise agree with the Bureau that Applicants' reliance on their "law of the case" theory is misguided. Applicants claim that an administrative law judge's 2003 order allowing them to pursue a minority distress sale applies to them in perpetuity, notwithstanding (1) the Supreme Court's overruling its own precedent that had upheld the minority distress sale policy's constitutionality; (2) the Commission's replacement of the minority distress sale policy with the eligible entity distress sale policy; (3) the court of appeals's vacation of the eligible entity standard; and (4) the Bureau's subsequent suspension of all policies relying on the vacated eligible entity definition. The logical conclusion of Applicants' argument is that an administrative law judge's order takes priority over not only later Commission orders, but decisions of the United States Court of Appeals for the Third Circuit and the United States Supreme Court. This is clearly a meritless position. In any event, the Bureau correctly pointed out that "law of the case" does not apply where, as here, there have been intervening changes in applicable law.²² We thus reject Applicants' contention that the ALJ's characterization seven years ago of his predecessor presiding judge's rulings as to the "law of the case" compels us to allow them to pursue a minority distress sale notwithstanding the aforementioned developments in the law.

III. CONCLUSION AND ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that, for the foregoing reasons and pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's rules,²³ the Application for Review filed by the Applicants IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²¹ See also 2014 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rule Making and Report and Order, 29 FCC Rcd 4371, 4480 para. 246 (2014) ("Although the Commission and Congress previously made available race- and gender-conscious measures intended specifically to assist minorities and women in their efforts to acquire broadcast properties, such as tax certificates and distress sale policies, those policies and programs were discontinued following the Supreme Court's 1995 decision in [*Adarand*]."). In any event, this decision affirming the Bureau's actions moots the Applicants' contention that the Bureau has exceeded its "delegated authority and jurisdiction." AFR at 5.

²² See, e.g., *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999) (law of the case may be revisited only if there is an intervening change in the law or if the previous decision was clearly erroneous and would work a manifest injustice); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C. Cir. 1995). Additionally, with regard to Applicants' continued assertion that we "recognized" the minority distress sale policy's validity in the *Ware MO&O* (AFR at 7), we concur with the Bureau that our statement in that order that the 2004 Applications were filed under the minority distress sale policy was descriptive only, not determinative. See *Reconsideration Decision* at 4-5; *Ware MO&O*, 29 FCC Rcd at 15061 para.1. We also note, as we did in the *Ware MO&O*, that Applicants could have availed themselves of the eligible entity distress sale policy before it was suspended, but chose not to. *Id.* at 15064 n.21; see *supra* note 6.

²³ 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(g).